Supreme Court, U.S.
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No.

In the Supreme Court of the United States

CYNTHIA YOUNG, on behalf of herself and all others similarly situated,

Petitioners,

v.

VERIZON'S BELL ATLANTIC CASH BALANCE PLAN, and VERIZON COMMUNICATIONS, INC.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Employee Retirement Income Security Act of 1974 (ERISA) guarantees pension-plan participants the benefits due "under the terms of" their ERISA plans. In 2006, a class of participants sued to enforce the fundamental pension formula in Verizon's 1996 Plan. The district court found that the formula was unambiguous and Verizon abused its administrative discretion by ignoring it. Verizon then counterclaimed, alleging the formula was a scrivener's error and seeking "equitable relief" under ERISA § 502(a)(3)(B) to reform the ten-year-old Plan. The district court allowed discovery, held a bench trial, and found that Verizon was profoundly negligent and that it actually discovered its mistake in 1997. Nevertheless, it reformed the Plan, and the Seventh Circuit affirmed.

This petition presents three questions:

1. Whether ERISA authorizes importing the common-law doctrine of scrivener's error to retroactively change material, unambiguous pension-plan terms.

2. Whether ERISA authorizes equitable reformation of a plan when that relief does not seek to "redress" violations or "enforce" provisions of ERISA or an ERISA plan, as required by ERISA § 502(a)(3)(B)(i)-(ii).

3. Whether the statute of limitations for a fiduciary's equitable-reformation claim based on an alleged scrivener's error accrues when the fiduciary knows or should have known of the mistake or when it learns that the mistake will "give rise to a controversy."

PARTIES TO THE PROCEEDING

Petitioners are Cynthia Young and a class of all similarly situated participants in Verizon's Bell Atlantic Cash Balance Plan.

Respondents are Verizon's Bell Atlantic Cash Balance Plan and Verizon Communications, Inc., which acted as both the plan sponsor and plan administrator.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Cynthia Young and the class respectfully submit this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the court of appeals is published at 615 F.3d 808 (7th Cir. 2010) (Appendix A). The opinion of the district court granting reformation is published at 667 F. Supp. 2d 850 (N.D. Ill. 2009) (Appendix B). The opinion of the district court reversing Verizon's administrative decision is published at 575 F. Supp. 2d 892 (N.D. Ill. 2008) (Appendix C). The order of the court of appeals denying the petition for rehearing is reprinted in Appendix D.

JURISDICTION

The court of appeals issued its opinion on August 10, 2010. It denied a motion for rehearing and rehearing en banc on September 8, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1), states, "Every employee benefit plan shall be established and maintained pursuant to a written instrument."

ERISA § 402(b)(4), 29 U.S.C. § 1102(b)(4), states, "Every employee benefit plan shall . . . specify the

basis on which payments are made to and from the plan."

ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D), states, "a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and . . . in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter."

ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), states, "A civil action may be brought . . . by a participant or beneficiary . . . to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan."

ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), states, "A civil action may be brought . . . by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan."

The relevant ERISA sections are set forth in full in Appendix E.

STATEMENT OF THE CASE

The circuits are irreconcilably divided over how to deal with drafting errors in ERISA plan documents. Most circuits hold employers strictly to the terms in the plan document, importing the common-law doctrine of scrivener's error only when the plan is ambiguous, confusing, or contradictory. In this case, though, the Seventh Circuit "shook up the employee benefits/ERISA world" by holding that even the most crystal-clear, vested benefits may be eliminated from a plan document, thereby "directly weakening ERISA's written plan rule." Stanley D. Baum, *The Big Dent in ERISA's Written Plan Requirement—Young v. Verizon's Bell Atlantic Cash Balance Plan*, BNA Pension & Benefits Daily (Nov. 5, 2010).

This divergence between the Seventh Circuit and every other federal circuit court to have considered the issue is directly at odds with ERISA's objective of "provid[ing] a uniform regulatory regime over employee benefit plans." *Aetna Health Inc. v. Davila*, 542 U.S. 200, 208 (2004). A system where employees in San Francisco have different ERISA rights than those in Chicago is untenable. The Court should grant review to establish national uniformity on this critical issue of ERISA law.

1. Legal backdrop

In the early 1970s, Congress decided that the patchwork of state and federal laws covering pensions, including the common law of contracts and trusts, was not adequately protecting employee retirement benefits. So, after "a decade of congressional study," it enacted ERISA. *Mertens v. Hewitt Assocs.*, 508 U.S.

248, 251 (1993). Comprehensive in scope, ERISA cleared the field of all state and federal common-law doctrines, "ensur[ing] that employee benefit plan regulation would be 'exclusively a federal concern.'" *Aetna*, 542 U.S. at 208.

In crafting ERISA, Congress resolved "innumerable disputes between powerful competing interests," *Mertens*, 508 U.S. at 262, through a combination of bright-line rules and an exclusive enforcement scheme. The most important rule is the plan-documents rule (or writing requirement), designed to guarantee that, "on examining the plan documents," participants may "determine exactly what [their] rights and obligations are under the plan." *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 83 (1995) (citing H.R. Rep. No. 93-1280, at 297 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4639). It requires that every employee benefit plan be "established and maintained pursuant to a written instrument," 29 U.S.C. § 1102(a)(1), "specify[ing] the basis on which payments are made to and from the plan," § 1102(b)(4), and imposes a fiduciary duty on plan administrators to act "in accordance with" the plan document, § 1104(a)(1)(D). The statute "provides no exemption from this duty when it comes time to pay benefits." *Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan*, 129 S. Ct. 865, 875 (2009).

Congress also created six "carefully integrated civil enforcement provisions" to replace the federal- and state-law actions ERISA preempted. *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146 (1985). One provision is the action for benefits "under the terms of" the plan in § 1132(a)(1)(B), which "reinforces" the plan-documents rule. *Kennedy*, 129 S. Ct. at 875. Another is

ERISA § 502(a)(3)(B), 29 U.S.C. § 1132(a)(3)(B), which allows for equitable relief under limited conditions. First, the relief must be the proper *type*—"appropriate equitable relief"—meaning "those categories of relief that were typically available in equity." *Sereboff v. Mid Atlantic Med. Servs., Inc.*, 547 U.S. 356, 361 (2006). Second, the relief must be sought for one of only two authorized purposes: (1) "to redress" violations of ERISA or an ERISA plan or (2) "to enforce" provisions of ERISA or an ERISA plan. 29 U.S.C. § 1132(a)(3)(B)(i)–(ii); *Peacock v. Thomas*, 516 U.S. 349, 353 (1996).

Over the past 36 years, the lower courts have repeatedly tried to bypass the plan-documents rule to avoid what they considered unpalatable outcomes. And Justices of this Court have decried the "unjust" results that sometimes flow from the limited equitable relief afforded by § 502(a)(3)(B). *Aetna*, 542 U.S. at 222 (Ginsburg and Breyer, JJ., concurring). But this Court has consistently toed the line, refusing to "tamper with the enforcement scheme embodied in the [ERISA] statute by extending remedies not specifically authorized by its text." *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 209 (2002); *see also Kennedy*, 129 S. Ct. at 875–76 (plan-documents rule preempts federal common law of waiver); *Peacock*, 516 U.S. at 353 (action barred because relief did not seek to "redress" or "enforce" ERISA or an ERISA plan). The risk of unjust results in some cases is a price Congress was prepared to pay in exchange for national "uniform[ity]," *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 379 (2002), and "simple administration," *Kennedy*, 129 S. Ct. at 875.

2. Factual background

In 1996, Bell Atlantic Corp. (Verizon's predecessor) converted its $5-billion defined-benefit plan (covering tens-of-thousands of non-union employees) from a traditional plan to a cash-balance plan. App. 61a. The conversion was extremely complicated, requiring an entirely new plan document. *Id.*

Verizon displayed, according to the Seventh Circuit, a "profound" and "baffling" degree of "institutional" negligence in drafting the new plan. *Id.* 23a. It charged a single in-house attorney with drafting and reviewing the final plan document. *Id.* No one ever proofread it, and no one was required to sign it. *Id.* 73a. As a result, the final plan document was littered with unintended provisions, including some of its most crucial terms. *E.g.*, *id.* 224a, 225a (definition of "Accrued Benefit" refers to non-existent Section 3.1.1(a)); *id.* 224a, 227a (definition of "Participating Employer" refers to non-existent list of Participating Employers); *id.* 225a, 226a (Section 4.5.1 refers to non-existent Section 5.1(a)); *id.* 227a, 226a (Section 13.7 refers to non-existent Section 10.2(b)).

One of those crucial terms was the fundamental pension formula for some 14,000 employees. That mathematical formula unambiguously provided that,

$$\text{Opening Balance} = (A) \times (B) \times (A)$$

where

A = "transition factor" (a variable based on an employee's age and years of service)

and

> B = lump-sum dollar amount derived from the formula in the old plan.

Id. 227a. The second variable (A) in the formula is referred to by the parties and the lower courts as the "second transition factor."

Verizon officially adopted this formula on July 6, 1996, in a final plan document called the Bell Atlantic Cash Balance Plan (the "Plan"). *Id.* 71a. It then sent an SPD to participants that was silent on the use of the transition factors but promised multiple times that the "official plan document" would always control benefit calculations. *Id.* 229–30a. Both before and after the Plan was adopted, Verizon sent a series of other communications to participants promising that the Plan document would always govern over any conflicting communication, *id.* 22a, 49a, and also stating that benefits would be computed using a "transition multiplier," *id.* 48a.

Verizon also acted as the plan administrator, carrying with it a fiduciary duty to act "in accordance with" the Plan document. *Id.* 34a. Verizon knew the 1996 Plan required using two transition factors at least as early as August 1997, but paid benefits using only one transition factor, not two. *Id.* 13a. As a result, Verizon underpaid benefits to approximately 14,000 participants by as much as $1.6 billion. *Id.* 54a. Then, in September 1997, Verizon adopted the 1997 Plan, knowing that it also contained the second transition factor. *Id.* 77–78a. One month later, Verizon submitted the 1996 and 1997 Plans—both containing the second transition factor—to the IRS for a tax determination

letter, representing that it was administering the Plan in accordance with its written terms, even though it knew it was not. *Id.* 78–79a.

In 1998, Verizon eliminated the second transition factor from the Plan document. *Id.* 13a. It did so unilaterally, without using the IRS's Employee Plans Compliance Resolution System (EPCRS). *Id.* 82–83a. And despite its fiduciary duties of loyalty, honesty, and full disclosure, it never told participants it changed their fundamental pension formula. *Id.*

3. Procedural history

In 2006, after Young filed suit challenging another aspect of the Plan transition, her attorneys discovered the second transition factor and learned that Verizon had failed to follow it. App. 5a. So Young filed suit on behalf of a class of similarly situated Verizon employees under ERISA § 502(a)(1)(B) for benefits due "under the terms of" the Plan. *Id.*

Verizon administratively denied Young's claim on the grounds that the second transition factor was a mistake, but the district court ruled the denial an abuse of discretion. *Id.* 175–79a. The district court held that the second transition factor was unambiguous and completely consistent with the rest of the Plan document. *Id.* As plan administrator, the court reasoned, Verizon had a duty to follow the Plan and therefore could not unilaterally reform it or decide it was mistaken in the administrative process. *Id.* The court held that Verizon should have sought to reform the Plan in court. *Id.* 188a. Verizon then counterclaimed against the plaintiff class for

reformation of the Plan—10 years after discovering the second transition factor. *Id.* 30a.

To litigate Verizon's reformation claim, the parties undertook the task of divining Verizon's decade-old intent. The process required "extensive discovery," *id.* 94a, involving several entities, including the accounting, legal, consulting, and actuarial firms involved in Plan design, drafting, and implementation; the production and review of tens-of-thousands of pages of documents (with lengthy discovery battles); and several depositions across the country. Finally, the district court held a three-day bench trial, involving hundreds of exhibits and several witnesses (both live and by deposition). *Id.*

On November 2, 2009—after 4 years of litigation—the district court granted Verizon's claim for equitable reformation, finding that (1) Verizon established by "clear and convincing evidence" that it intended to use only one transition factor, (2) it was "unlikely" participants had actually read the Plan document, and (3) Verizon's reformation claim was timely because it accrued when Young claimed benefits under the second transition factor, not when it actually discovered the mistake. *Id.* 102a, 117a, 128a. Despite Plaintiffs' argument, the district court failed to consider whether Verizon's reformation claim satisfied one of the authorized purposes for equitable relief under ERISA § 502(a)(3)(B)(i)–(ii). *Id.* 108–13a.

The Seventh Circuit affirmed the district court in its entirety. *Id.* 28a. Like the district court, it recognized that the Plan unambiguously calls for two transition factors. *Id.* 19a. Nevertheless, it concluded that "no plan participants were likely to have relied

upon the scrivener's error," *id.* 18a, in light of the communications describing the use of a single "transition multiplier" (the same communications that promised the Plan would always govern in the case of any conflict), *id.* 22a.

It also concluded that equitable relief was authorized under § 502(a)(3)(B) for the purpose of furthering a "basic goal" of ERISA and to "avoid" what it perceived as an "unfair result." *Id.* 18a. The court acknowledged that allowing reformation would "undermine" the plan-documents rule and "encourage protracted, discovery-intensive litigation" regarding intent, in violation of *Kennedy*. *Id.* 19a. "Even so," it held, the "added litigation burden" was not a sufficient reason to deny reformation. *Id.* Regarding the statute of limitations, the Seventh Circuit held Verizon's reformation claim did not accrue until Plaintiffs sued in 2006, even though Verizon had actual knowledge of the error in 1997. *Id.* 12–14a. The Seventh Circuit rejected a timely petition for rehearing or rehearing en banc. *Id.* 192a.

REASONS TO GRANT THE WRIT OF CERTIORARI

I. The circuits are split over whether and how the common-law doctrine of scrivener's error applies to ERISA plans.

There has been an explosion of activity over alleged mistakes in ERISA plan documents over the past eight years. *See, e.g.*, *Young v. Verizon's Bell Atlantic Cash Balance Plan*, 615 F.3d 808 (7th Cir. 2010); *Cross v. Bragg*, 329 Fed. Appx. 443 (4th Cir. 2009); *Blackshear v. Reliance Standard Life Ins. Co.*, 509 F.3d 634 (4th

Cir. 2007); *Banuelos v. Constr. Laborers' Trust Funds for S. Cal.*, 382 F.3d 897 (9th Cir. 2004); *Bergt v. Ret. Plan for Pilots Employed by Markair, Inc.*, 293 F.3d 1139 (9th Cir. 2002); *Stanford v. Foamex L.P.*, No. 07-4225, 2010 WL 3488651 (E.D. Pa. Aug. 31, 2010); *Rea v. Hershey Co.*, No. 06-1920, 2008 WL 2782663 (M.D. Pa. July 15, 2008); *Humphrey v. United Way of Tex. Gulf Coast*, No. 05-758, 2007 WL 2330933 (S.D. Tex. Aug. 14, 2007). And at least two commenters have recognized "a significant recent increase in the frequency of scrivener's errors." David A. Pratt & Martin M. Heming, *Focus On . . . Scrivener's Errors*, 15 J. Pension Benefits 19 (Summer 2008).

In response, the circuits have adopted incompatible standards. *See Humphrey v. United Way of Tex. Gulf Coast*, No. 05-758, 2010 WL 4791486, *18, 20–21 (S.D. Tex. Nov. 15, 2010) (discussing *Young v. Verizon* and noting, "there are a small number of cases, with differing views, which have addressed the issue of reformation based on scrivener's error in an ERISA context," with Fourth and Fifth Circuits differing from Seventh); *Foamex*, 2010 WL 3488651, at *9 n.14 (noting that Fourth Circuit conflicts with Third and Seventh regarding elements of scrivener's-error claim under ERISA). The Seventh Circuit's decision has further muddied the issue by developing yet another approach. This Court's review is required to end the confusion on this recurring issue of ERISA law.

A. Only the Seventh Circuit imports the scrivener's-error doctrine regarding unambiguous ERISA plans.

1. The Third, Fourth, Fifth, Eighth, and Ninth Circuits reject the scrivener's-error doctrine regarding clear ERISA plans.

The Ninth Circuit consistently enforces unambiguous ERISA plan terms—even if they are drafting mistakes. Claims of scrivener's error, and the extrinsic evidence they require, are barred by the plan-documents rule. *Cinelli v. Sec. Pac. Corp.*, 61 F.3d 1437, 1445 (9th Cir. 1995). In *Cinelli*, an employee sued to reform a life-insurance plan to include vesting language that the employer accidently omitted. *Id.* at 1440. The Ninth Circuit rejected the claim because the challenged plan term, although erroneous, was unambiguous and fundamental. *Id.* at 1445. In those circumstances, the court held, "ERISA's strong preference for the written terms of the plan and the goal of ERISA to ensure that an employee's rights and obligations can be readily ascertained from the plan documents" bar the application of "principles of mistake," by either employee or employer. *Id.*

Since *Cinelli*, the Ninth Circuit has twice held employers strictly liable for mistaken plan terms. In *Bergt v. Ret. Plan for Pilots Employed by Markair, Inc.*, 293 F.3d 1139, 1145 (9th Cir. 2002), it held an employer to an erroneous plan provision, even though there was a "long-standing understanding" to the contrary, which was accurately documented in the SPD. The court refused to consider "extrinsic evidence to resolve the conflict" between the SPD and the plan

document because "[t]he plan master document is the main document that specifies the terms of the plan, and employees should be entitled to rely on its unambiguous provisions." *Id.* Similarly, in *Banuelos v. Constr. Laborers' Trust Funds for S. Cal.*, 382 F.3d 897 (9th Cir. 2004), the court held an employer to a five-year vesting provision that was "incorrect," "never adopted," and "accidentally" included in the plan document. *Id.* at 901. It refused to consider extrinsic evidence of intent, holding that "[c]ourts will generally bind ERISA defendants to the more employee-favorable of two conflicting documents —*even if one is erroneous*." *Id.* at 904 (emphasis added).

The Fourth Circuit followed *Cinelli* in *Blackshear v. Reliance Standard Life Ins. Co.*, 509 F.3d 634, 637–38 (4th Cir. 2007), and rejected an employer's claim to reform an ERISA plan to include a six-month waiting period for coverage that was accidentally omitted. The court found the employer's intent irrelevant because reforming the plan would "foster uncertainly about employee benefits rather than furthering ERISA's goal of 'ensur[ing] that an employee's rights and obligations can be readily ascertained from the plan documents.'" *Id.* at 643 (quoting *Cinelli*, 61 F.3d at 1445); *see also Audio Fidelity Corp. v. PBGC*, 624 F.2d 513, 517–18 (4th Cir. 1980).

More recently, in *Cross v. Bragg*, 329 Fed. Appx. 443, 455 (4th Cir. 2009), the Fourth Circuit refused to reform a plan to correct an unambiguous benefit-formula, even though it was clearly a "drafting mistake." The employer had always paid benefits according to its intent, and the participants never relied on the plan text, but the Fourth Circuit

unanimously held that "when the terms of an ERISA plan are clear and unambiguous, a federal court is obliged to apply it as written." *Id.* at 454.

The Fifth Circuit also rejects claims of mistaken ERISA plan documents. *Hansen v. Cont'l Ins. Co.*, 940 F.2d 971, 982 (5th Cir. 1991). In *Hansen*, it rejected an employer's claim that an SPD contained a scrivener's error, holding that "[a]ny burden of uncertainty created by careless or inaccurate drafting" rests on the employer who does the drafting and is "most able to bear that burden." *Id.* "Accuracy is not a lot to ask," considering "the protection afforded by ERISA's preemption of state law causes of action—causes of action which threaten considerably greater liability than that allowed by ERISA." *Id.* Relying on *Hansen* in a case almost indistinguishable from this one, the Southern District of Texas refused to reform a plan document that mistakenly stated "plus" instead of "greatest of" in a formula, thereby doubling benefits. *Humphrey*, 2007 WL 2330933, at *1–2, 11–12.

The Third and Eighth Circuits allow scrivener's-error claims in the ERISA context, but only if reasonable participants would have been confused or unclear about their benefits *if they had read the plan document*. Only if this objective threshold is met will they allow inquiries into the intent of the parties and consider extrinsic evidence outside the four corners of the plan document.

In *Int'l Union v. Murata N. Am. Inc.*, 980 F.2d 889 (3d Cir. 1992), the Third Circuit considered a dispute over excess funds in a collectively bargained plan. Should they be paid to the employer or the participants after plan termination? *Id.* at 893. The

operative plan document was silent on the issue, *id.* at 895, but the employer claimed the union agreed to direct any excess to the employer and that the omission of that term was "the result of a scrivener's error," *id.* at 906–07. So the employer sought to reform the plan to correct the alleged mistake. *Id.*

The Third Circuit acknowledged that the scrivener's-error doctrine is "at odds with" ERISA because it could lead to employees believing they have rights that are later taken away by a court. *Id.* at 907. But it concluded that concern was "less pertinent" under the facts of *Murata* because the plan document was unclear about what to do with excess funds. *Id.* Therefore, reasonable participants reading the plan document would not have been led to believe they would be entitled to any excess. *Id.* But the Third Circuit will not look outside an unambiguous plan to divine a party's intent. *Id.*; *Bill Gray Enters., Inc. Employee Health & Welfare Plan v. Gourley*, 248 F.3d 206, 218 (3d Cir. 2001) ("If the plain language of the [plan] document is clear, courts must not look to other evidence.").

Similarly, in *Wilson v. Moog Auto., Inc. Pension Plan*, 193 F.3d 1004 (8th Cir. 1999), the Eighth Circuit considered a claim for early retirement benefits after the plaintiffs' manufacturing plant was shut down. The collectively bargained closing agreement between the union and the company did not provide the disputed benefits, but a later plan amendment accidentally did. *Id.* at 1006. The Eighth Circuit acknowledged that it was bound by the plan-documents rule. *Id.* at 1008. But it held that the closing agreement was itself a "plan document"—it was expressly incorporated into the plan—and that the

conflict between it and the master plan document created "an ambiguity" allowing the court to consider extrinsic evidence of the parties' intent. *Id.* at 1009; *see also Barker v. Ceridian Corp.*, 122 F.3d 628, 634 (8th Cir. 1997) (plan language is given "common and ordinary meaning" that "a reasonable person in the position of the [plan] participant, not the actual participant, would have understood"). So, like the Third Circuit, the Eighth Circuit looks outside the plan to extrinsic evidence of the parties' intent *only if* the language is first found ambiguous.

2. The Seventh Circuit imports the scrivener's-error doctrine even as to unambiguous ERISA plans, conflicting with every other circuit to address the issue and *Kennedy*.

Breaking from the Third, Fourth, Fifth, Eighth, and Ninth Circuits, the Seventh Circuit views the plan-documents rule as a "rigid and archaic" notion, App. 19a, that can be disregarded to allow the court "flexibility in . . . enforcement" to reach "fair, equitable results," *id.* 15a. Therefore, unlike any other circuit, the Seventh Circuit will import the scrivener's-error doctrine to allow an employer to retroactively eliminate even the clearest and most material ERISA plan terms.

Ambiguity is not even relevant in the Seventh Circuit's view. It sees "little difference" between a case involving unclear or contradictory plan language and a case involving language that is perfectly clear yet challenged as a mistake. *Id.* 19a. "In each case," the Seventh Circuit held, its *first* step is to "look beyond

the plan document to extrinsic evidence to determine the parties' understanding of the plan." *Id.*

The Seventh Circuit has a history of using extrinsic evidence of intent to disregard unambiguous ERISA plan terms. In *Mathews v. Sears Pension Plan*, 144 F.3d 461, 467–68 (7th Cir. 1998) (Posner, J.), it read the term "date of distribution" to mean "January 1 of the plan year in which the distribution occurs"—rather than the actual date of distribution—based on extrinsic evidence of the employer's intent. The Seventh Circuit relied on *Mathews* in the present case for the proposition that federal courts may "put the parties' reasonable expectations ahead of the literal text of an ERISA plan" where the employer offers extrinsic evidence consistent with a contrary intent. App. 16a. Under those circumstances, the Seventh Circuit held, it is not bound by the "literal" language of the plan through "rigid and archaic" rules of contract law (*i.e.*, the plan-documents rule). *Id.* 16a, 18a.

The Seventh Circuit's approach is shockingly different from the other circuits to have confronted the issue of scrivener's error in ERISA. It conflicts with the Ninth Circuit, where the plan-documents rule acts as a categorical bar on using extrinsic evidence of intent to alter "fundamental," "unambiguous" plan terms. *Cinelli*, 61 F.3d at 1445. It conflicts with the Fifth Circuit, which places the burden of "careless or inaccurate drafting" squarely on the shoulders of the employer. *Hansen*, 940 F.2d at 982; *Humphrey*, 2010 WL 4791486, at *20 ("[T]he Fifth Circuit would not follow the district court in *Young*'s trial to take testimony as United Way asks this Court to do here, where the Court has found the Plan's language is clear and unambiguous and where there have been no

allegations of fraud."). And it conflicts with the Fourth Circuit's refusal to consider evidence of intent because it would "foster uncertainly about employee benefits," undermining the plan-documents rule. *Blackshear*, 509 F.3d at 637–38.

Even the Third and Eighth Circuits do not *begin* by examining extrinsic evidence of intent. Those courts first require that the plan terms be unclear in some way—like the plan that was silent about what to do with excess funds in *Murata*, 980 F.2d at 895, or the contradictory plan provisions regarding early retirement benefits in *Moog*, 193 F.3d at 1008. Only after making the *objective* determination that the language is ambiguous (and, hence, that hypothetical participants could not have reasonably relied on it), will they use extrinsic evidence to make a *subjective* determination of what the parties actually intended. Here, in contrast, the Seventh Circuit recognized that the Plan was unambiguous and, therefore, not confusing to a reasonable participant reading the Plan. App. 19a. But it inquired into the intent of the parties anyway. *Id.*

Finally, by considering reams of extrinsic evidence in an intent-based inquiry despite an unambiguous plan document, the Seventh Circuit contradicted this Court's unanimous decision in *Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan*, 129 S. Ct. 865, 870 n.5 (2009), which itself abrogated the Seventh Circuit's refusal to enforce the plan-documents rule over the federal common-law doctrine of waiver in *Fox Valley & Vicinity Constr. Workers Pension Fund v. Brown*, 897 F.2d 275 (7th Cir. 1990). In *Kennedy*, a plan participant forgot to change his designated beneficiary under the plan from his ex-wife to his current wife.

Kennedy, 129 S. Ct. at 869. When the plan administrator paid the benefits to the ex-wife, a windfall resulted—she received funds she had unequivocally waived in the divorce. *Id.* at 876. But the Court held that outcome was demanded by the "bright-line" plan-documents rule. *Id.* It refused to accept the "cost of less certain rules," including,

- forcing employees to examine external documents to determine their benefits,

- litigating over the meaning of those extrinsic documents, and

- "destroy[ing] a plan administrator's ability to look at the plan documents" to "get clear distribution instructions, without going into court."

Id. at 875–76. The Court held that the plan-documents rule forbids inquiries into "nice expressions of intent," even if the inquiry deals with only one person whose intent is documented in a divorce decree. *Id.*

The Seventh Circuit clearly disagrees with *Kennedy*. It acknowledged as much in its decision, noting that its approach would "undermine" the plan-documents rule and "encourage protracted, discovery-intensive litigation" regarding intent, in violation of *Kennedy*. App. 19a. "Even so," it held, it was not required to deny scrivener's-error claims "based on the added litigation burden" they carry. *Id.* This disagreement is driven, no doubt, by the Seventh Circuit's view of the plan-documents rule as "rigid and archaic." *Id.* 16a, 18a. The Court should grant review to correct that misperception.

B. Only the Seventh Circuit allows scrivener's-error claims as to unilateral mistakes and requires participants to establish actual reliance on the plan document.

The Seventh Circuit's decision creates two additional circuit splits over the legal elements of an ERISA scrivener's-error claim.

First, the Third, Fourth, and Eighth Circuits require the employer to prove by clear and convincing evidence that the mistake was "mutual," or if unilateral, "accompanied by fraud on the part of the other contracting party." *Audio Fidelity Corp. v. PBGC*, 624 F.2d 513, 518 (4th Cir. 1980); *see also Murata*, 980 F.2d at 907 (requiring proof "that the mistake does not reflect the intent of the parties" through "history of collective bargaining negotiations"); *Moog*, 193 F.3d at 1009 (requiring proof of "the intent of the parties" through "negotiations between the Union and the Company"); *but see Foamex*, 2010 WL 3488651, at *9 n.14–16 (agreeing that Fourth Circuit requires mutual mistake and Seventh Circuit does not, but characterizing Third Circuit as not requiring mutual mistake, either).

Here, there was no bargained-for agreement; it was a unilateral take-it-or-leave-it offer from Verizon. And Verizon has never alleged Plaintiffs committed fraud of any kind. Since there was no evidence that any particular participant "agreed" to one transition factor, the Seventh Circuit required Verizon to prove only that *it* made a mistake. App. 20–22a. Applying the scrivener's-error doctrine to a unilateral mistake

created a split with the Third, Fourth, and Eighth Circuits.

Second, instead of requiring clear and convincing proof that *each* participant agreed to using just one transition factor in his or her pension formula, the courts below substituted a finding that participants "likely" did not rely on the second transition factor. App. 120–23a. The district court held as a matter of law that "what the plan beneficiaries actually read" are summary documents, such as SPDs, and *not* the formal plan document. *Id.* 122a (quoting *Mathews*, 144 F.3d at 466). The Seventh Circuit followed the district court, agreeing it was "likely" participants did not "expect" to be paid using the second transition factor, *id.* 18a, because "no employee complained" prior to this lawsuit, *id.* 9a, 21a.[1] Effectively, the courts below shifted the burden to participants to prove that they "relied on the literal plan language" in order to enforce it. *Id.* 17a.[2]

Importing a reliance requirement into an ERISA § 502(a)(1)(B) claim for benefits directly contradicts decisions of the Fourth and Second Circuits. In *Cross*

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[1] Both Courts disregarded Verizon's express promise in every writing that the Plan would govern over any conflicting communication. App. 22a, 122a.

[2] The relevance of subjective participant expectations is at issue in the currently-pending *Cigna Corp. v. Amara*, No. 09-804. There, the employer argues that each participant must prove detrimental reliance on a defective SPD to enforce it over the master plan document. As explained in Section V, below, *Amara* is closely related to this case, and a GVR is warranted if the Court does not accept plenary review.

v. Bragg, 329 Fed. Appx. 443, 455 (4th Cir. 2009), the employees admitted they "had *not* relied" on the mistaken plan term, but the Fourth Circuit held the employer to the mistake anyway, reasoning that the lack of reliance was irrelevant to a mutual mistake claim because "ignorance of a mistake is insufficient proof of a party's intent to the contrary." In *Feifer v. Prudential Ins. Co. of Am.*, 306 F.3d 1202, 1213 (2d Cir. 2002), the Second Circuit enforced a disability plan document that erroneously omitted an offset for Social Security benefits, holding that "a plaintiff need not show reliance, prejudice, or any other equitable factor to enforce plan terms in a claim under § 1132(a)(1)(B)."

Requiring participant reliance also conflicts with decisions from the Third, Fifth, and Sixth Circuits holding that a participant need not prove reliance on an SPD (considered a "plan document" in those circuits).[3] *See Washington v. Murphy Oil USA, Inc.*, 497 F.3d 453, 459 (5th Cir. 2007) ("employee need not show reliance or prejudice"); *Burstein v. Ret. Account Plan Employees of Allegheny Health Educ. & Research Found.*, 334 F.3d 365, 380–81 (3d Cir. 2003) (participant "need not plead reliance"); *Edwards v. State Farm Mut. Auto. Ins. Co.*, 851 F.2d 134, 137 (6th Cir. 1988) (participant need not "prove detrimental reliance"); *see also Humphrey*, 2007 WL 2330933, at *12 (participants' lack of reliance on erroneous plan document "legally irrelevant").

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[3] The question of whether an SPD is a "plan document" is also implicated in *Cigna Corp. v. Amara*, No. 09-804.

The Seventh Circuit's reliance requirement also conflicts with *Kennedy*'s holding that plan administrators must pay benefits according to the terms of the plan document and that ERISA "reinforces" that directive by giving participants an unqualified cause of action "to recover benefits due to [them] under the terms of [their] plan." *Kennedy*, 129 S. Ct. at 875. The *Kennedy* Court did not find it relevant that the ex-wife never "expected" the benefits at issue, having negotiated them away in her divorce proceedings. *Id.*

Finally, the Seventh Circuit's importation of a reliance requirement into an ERISA § 502(a)(1)(B) claim contradicts this Court's recent decision in *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 655 (2008). There, the Court held that where a statute—in that case, RICO—does not expressly contain a reliance requirement, the courts may not sneak one in "through the back door." *Id.* But that is exactly what the Seventh Circuit did here under the rubric of participant "expectations." App. 18a, 20a.

II. The Seventh Circuit's refusal to apply ERISA § 502(a)(3)(B)(i)–(ii) conflicts with five decisions from this Court and every other circuit to have considered the issue.

Verizon brought its reformation claim under ERISA § 502(a)(3)(B), which states in relevant part,

> A civil action may be brought—
>
> . . .
>
> (3) by a participant, beneficiary, or fiduciary

> (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or
>
> (B) to obtain other appropriate equitable relief
>
> *(i) to redress such violations or*
>
> *(ii) to enforce any provisions of this subchapter or the terms of the plan.*

29 U.S.C. § 1132(a)(3) (emphasis added). Crucially, Verizon has never alleged that its reformation claim sought to "redress" a violation or "enforce" the terms of ERISA or the Plan.

The Seventh Circuit ignored subparagraphs (B)(i) and (ii)—what Plaintiffs refer to as the purpose prong—and effectively created a new allowable purpose: the purpose of promoting a "basic goal" of ERISA or avoiding a perceived "unfair result." App. 18a. This judicial rewrite of ERISA § 502(a)(3)(B) directly contradicts at least five decisions of this Court interpreting the same section of the statute.

In *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 145 (1985), the Court concluded that ERISA does not allow a court to "engraft a remedy on [ERISA], no matter how salutary," and denied a participant's claim for extra-contractual damages not expressly authorized by the plain text of the statute. Because ERISA is such a "comprehensive and reticulated" statute and the enforcement provisions in § 502(a) form an "interlocking, interrelated, and interdependent remedial scheme," any remedies not

expressly included by Congress were deliberately omitted. *Id.* at 146–47.

In *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 253 (1993), the Court recognized that § 502(a)(3)(B) "does not, after all, authorize 'appropriate equitable relief' *at large*, but only 'appropriate equitable relief' *for the purpose of* 'redress[ing any] violations or. . . enforc[ing] any provisions' of ERISA or an ERISA plan." (second emphasis added). *Mertens* rejected an action to recover against a fraudulent plan actuary because it was not "equitable" in nature, even though the relief might have advanced ERISA's "basic purpose." *Id.* at 261–62.

In *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 220–21 (2002), the Court held that ERISA does not allow the courts to expand equitable relief beyond the text's restrictions, even to further a "primary purpose" of ERISA. It therefore rejected a plan's attempt to use § 502(a)(3)(B) to enforce the reimbursement provision of a plan against a beneficiary who had recovered his losses from a third-party tortfeasor, reasoning that the relief was not "equitable" in nature. *Id.*

Since *Mertens*, the Court has twice rejected "equitable" claims on the grounds that they did not seek to "redress" or "enforce" ERISA or an ERISA plan, as required by the purpose prong. In *Peacock v. Thomas*, 516 U.S. 349, 353 (1996), the plaintiffs tried to use § 502(a)(3)(B) to recover against a non-fiduciary officer of the employer corporation who allegedly siphoned off corporate assets that should have been used to pay benefits. The Court held in an 8-1 decision that the action was barred by the purpose prong because the complaint "alleged no violation of ERISA

or the plan" and therefore could not have been brought "for the purpose of 'redress[ing any] violations or . . . enforc[ing] any provisions' of ERISA or an ERISA Plan." *Id.* (quoting *Mertens*, 508 U.S. at 253).

Then, in *Lockheed Corp. v. Spink*, 517 U.S. 882, 888–89 (1996), the Court unanimously followed *Peacock* and *Mertens* and affirmed the dismissal of a class-action suit against an employer and several non-fiduciary officers and directors under § 502(a)(3)(B) because there was no underlying ERISA violation. Without a violation of a specific ERISA provision, the Court held, the action could not possibly "warrant relief under the enforcement mechanisms" of § 502(a)(3)(B) because there was nothing to "redress" or "enforce," as required by the purpose prong. *Id.* (citing *Peacock*, 516 U.S. at 353; *Mertens*, 508 U.S. at 253).

The circuit courts overwhelmingly agree that a claim for equitable relief must meet the purpose prong to be viable under the statute. *See, e.g.*, *Gulf Life Ins. Co. v. Arnold*, 809 F.2d 1520, 1523–24 (11th Cir. 1987) (relief barred where it was "equitable" in nature but only real purpose was "to avoid making payment"); *Transamerica Occidental Life Ins. Co. v. Digregorio*, 811 F.2d 1249, 1251–52 (9th Cir. 1987) (relief barred where it was "equitable" in nature but only real purpose was to have court "interpret [the] contract"); *Skretvedt v. E.I. DuPont de Nemours*, 372 F.3d 193, 215 n.29 (3d Cir. 2004) (purpose prong requires benefits be withheld "in violation of ERISA or an ERISA plan" before court has authority to "redress" violation by awarding interest); *Dunnigan v. Met. Life Ins. Co.*, 277 F.3d 223, 229–30 (2d Cir. 2002) (same); *Fotta v. Trustees of United Mine Workers of Am.*, 165

F.3d 209, 215 (3d Cir. 1998) (Alito, J., concurring) (purpose prong authorizes interest to "redress" violation only if plaintiff establishes "that the trustees violated the plan by failing to pay his benefits on time").

Only the Seventh Circuit disagrees. Despite what it admitted were "forceful arguments" in Plaintiffs' briefs, App. 2a, the Seventh Circuit steadfastly ignored the text of ERISA § 502(a)(3)(B)(i)–(ii) and this Court's decisions. Its opinion does not even mention the purpose prong. Instead, it holds that any claim for equitable relief is viable under ERISA as long as it furthers a "basic goal" of ERISA or avoids a perceived "unfair result." *Id.* 18a.

Besides ignoring the statute, the opinions of this Court, and the other circuits, the problem with the Seventh Circuit's "limitation" on ERISA equitable relief is that it is no limitation at all. Vague notions of "basic goals" and "unfair results" provide little predictability. Federal judges have discovered *over a dozen* different basic "goals" or "purposes" of ERISA, including,

- "to provide a uniform regulatory regime over employee benefit plans," *Aetna*, 542 U.S. at 208;

- "encouraging the formation of employee benefit plans," *Nash v. Trustees of Boston Univ.*, 946 F.2d 960, 966 (1st Cir. 1991) (quoting *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987));

- "maintaining the actuarial soundness of pension plans," *Collins v. Pension & Ins. Comm. of S.*

Cal. Rock Prods. & Ready Mixed Concrete Assocs., 144 F.3d 1279, 1284 (9th Cir. 1998);

- "to provide a method for workers and beneficiaries to resolve disputes over benefits inexpensively and expeditiously," *Perry v. Simplicity Eng'g Div. of Lukens Gen. Indus., Inc.*, 900 F.2d 963, 967 (6th Cir. 1990);

- "to ensure the integrity and primacy of the written plans," *Health Cost Controls v. Isbell*, 139 F.3d 1070, 1072 (6th Cir. 1997).

Almost any claim for equitable relief could fit under one of these "goals." That goes doubly for "unfair results." Basing the availability of ERISA equitable relief on a judge's subjective notions of fairness provides no certainty. The Court should grant review to clarify the allowable purposes for equitable relief under ERISA § 502(a)(3)(B)(i)–(ii).

III. The Seventh Circuit's decision regarding the accrual of a reformation claim creates a split with the Fifth Circuit and over a century's worth of equity jurisprudence.

To avoid its perceived "unfair result," the Seventh Circuit also rewrote the federal common law governing when a statute of limitations begins to run on a claim. The general rule is that a cause of action accrues when a party possesses a "complete and present cause of action." *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp. of Cal., Inc.*, 522 U.S. 192, 195 (1997). Every circuit outside the Seventh has faithfully applied this principle. *E.g.*, *In re Raynor*, 617 F.3d 1065, 1071 (8th Cir. 2010); *Somoza v. New York*

City Dept. of Educ., 538 F.3d 106, 116 (2d Cir. 2008); *McNair v. Allen*, 515 F.3d 1168, 1174 (11th Cir. 2008); *Tidewater Fin. Co. v. Williams*, 498 F.3d 249, 255 (4th Cir. 2007).

Consistent with 100-years'-worth of equity jurisprudence, Verizon had a "complete and present cause of action" when it discovered the second transition factor in August 1997. *See* J.E.K., Annotation, *When Does Limitation or Laches Commence to Run Against Suit to Reform an Instrument*, 106 A.L.R. 1338 at § II(a) (2010) (collecting cases); *Farnsworth on Contracts* § 9.3, at 610 & n.54 (time to seek relief from mistake runs from time party "is or ought to be aware of" mistake). The parties here agreed Pennsylvania's four-year statute of limitations applied, App. 10a, meaning Verizon's reformation claim expired in August 2001, seven years before it filed its counterclaim.

The Fifth Circuit applies this standard to reformation claims. In *Harbor Ins. Co. v. Urban Constr. Co.*, 990 F.2d 195, 201 (5th Cir. 1993), it held that an action to reform an insurance policy eight years after the insured learned of the mistake was barred by a Texas four-year statute of limitations because "the limitations period begins to run from the time the party seeking reformation discovered, or should have discovered, the error or omission in the instrument." In *Humphrey*, 2010 WL 4791486, at *23, the district court recently applied the same rule, holding that an employer's counterclaim to reform an ERISA plan document was barred by the four-year statute of limitations where the employer "discovered the alleged scrivener's error . . . over nine years ago."

Contrary to this authority, the Seventh Circuit held that an employer's claim to reform an ERISA plan cannot accrue until it has actual knowledge—not of the mistake—but of a "controversy requiring it to raise an equitable reformation claim." App. 13a. So, here, it held that Verizon's reformation claim accrued only after Plaintiffs "put the transition factor language at issue" by filing this lawsuit, even though Verizon admits it had actual knowledge of the second transition factor in 1997. *Id.* 14a. Practically speaking, that standard means an employer or fiduciary may wait *indefinitely* after discovering an error in a plan document, as long as it hides the error from the participants.

This perversion of federal common law is contrary to the realities of the workplace and ERISA's purposes. Only employers drafting ERISA plans know their own intent since the Plan itself is a take-it-or-leave-it offer. The unequal distribution of information between the two contracting parties requires placing the burden on the employer/plan administrator to discover any mistakes and act quickly to reform them. *See Hansen*, 940 F.2d at 982. Quick action should be required since ERISA's statutory scheme requires everyone to depend on plan documents. *Kennedy*, 129 S. Ct. at 875.

Moreover, ERISA requires that plan administrators like Verizon "deal fairly and honestly with beneficiaries," *Varity Corp. v. Howe*, 516 U.S. 489, 506 (1996), requiring prompt disclosure of scrivener's errors to participants who may have relied on them. But the Seventh Circuit's decision undermines ERISA's fiduciary duties by incentivizing fiduciaries to hide their mistakes. If reformation of employee-benefit plans is to be allowed, there must be a time limit, and

this Court should clarify when that time limit begins to run under federal common law.

IV. The questions presented are exceptionally important to employees, employers, plan administrators, and the government.

The Court should grant review because the circuit splits in this case create unacceptable regulatory uncertainty and the Seventh Circuit's decision is at odds with ERISA's fundamental scheme and statutory objectives.

The circuit splits discussed here violate the goal of national uniformity that ERISA was designed to establish. *See Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 379 (2002). It directly contravenes ERISA's regulatory objectives for employees in the Third, Fourth, Fifth, Eighth, and Ninth Circuits to be able to rely on benefits clearly described in their plan documents while those in the Seventh Circuit cannot.

Also, the circuit splits here could cause unacceptable forum shopping by plan sponsors and administrators. ERISA creates federal-question jurisdiction wherever "the plan is administered" under 29 U.S.C. § 1132(e)(2). Moving plan administration is relatively easy and inexpensive. So negligent plan sponsors can simply relocate their administrative offices to Chicago to avail themselves of the Seventh Circuit's lax rules should they commit a large enough drafting error. Verizon, in fact, unintentionally did just that in this case. App. 92a. The risk of forum shopping is especially great because there is effectively no time limit for reformation under the Seventh Circuit's rationale. (*See* Section III, above.)

Review is further warranted because the Seventh Circuit's exception to the plan-documents rule undermines ERISA's statutory objectives by weakening two paramount goals of ERISA.

First, ERISA seeks to facilitate efficient administration of employee benefit plans. *Kennedy*, 129 S. Ct. at 875-76. By focusing benefit determinations solely on the plan documents, ERISA promotes simplicity, ease of administration, and quick payment of claims. *Id.* Everyone benefits from this scheme—employees, employers, and plan administrators. *Id.* But the Seventh Circuit's decision undermines this goal by allowing parties to litigate over the "meaning" of extrinsic documents and inquire into "nice expressions of intent." *Contra id.* This case required examining a mountain of evidence to divine the employer's intent. The next case might involve a *participant* claiming a scrivener's error—perhaps based on a more employee-favorable SPD, *see Cigna Corp. v. Amara*, No. 09-804. Under the Seventh Circuit's rationale, that would require the court to admit extrinsic evidence of the *participant's* understanding of the "agreement," increasing costs to plan sponsors and administrators.

Second, ERISA seeks to ensure that participants may "*on examining the plan documents*, determine exactly what [their] rights and obligations are under the plan." *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 83 (1995). Participants need one authoritative place to go to determine their benefits so they can accurately plan for retirement. But if the master plan document can be retroactively changed—*10 years after the fact*—to eliminate a vested pension benefit, participants cannot rely solely on that document.

Instead, they will be forced to "examine a multitude of documents," some of which may contradict each other, to try to determine their retirement benefits. *Kennedy*, 129 S. Ct. at 876. This intolerable scenario is exactly what Congress wanted to avoid. *Id.*

In fact, as a unanimous Court stated just last year, "ERISA's statutory scheme 'is built around reliance on the face of written plan documents.'" *Id.* at 875. And because everyone is expected to look to the face of the written plan documents, it is exceptionally important to "provide as strong an incentive as possible for employers" to draft them accurately. *Bergt v. Ret. Plan for Pilots Employed by Markair, Inc.*, 293 F.3d 1139, 1145 (9th Cir. 2002) (enforcing erroneous plan over SPD); *see also Hansen*, 940 F.2d at 982. If employers know they will be held accountable for their drafting errors, they will spend the necessary time and money drafting and proofreading plan documents.

Finally, review is warranted because the Seventh Circuit's decision impedes government regulation of ERISA plans. Congress charged various government agencies with regulatory powers under ERISA, and that framework is built around the face of written plan documents. For example, the Department of Labor can impose civil penalties on plan fiduciaries who breach their duty, codified in 29 U.S.C. § 1104(a)(1)(D), to act "in accordance with the documents and instruments governing the plan," under 29 U.S.C. § 1132(l). The DOL also promulgates and enforces related regulations, such as 29 C.F.R. § 2560.503-1(b)(5), which requires employers to ensure that "benefit claim determinations are made in accordance with governing plan documents." Allowing courts to retroactively

reform unambiguous plan documents could seriously undermine the DOL's enforcement regime.

The IRS, for its part, has "consistently refused to recognize a 'scrivener's error' defense for plan language that does not reflect actual operations." Anne E. Moran, *Fixing the Problem: Correcting Errors in Qualified Plans*, 32 Emp. Rel. L.J. No. 2 (Fall 2006).[4] As far as the IRS is concerned, a "failure to follow plan provisions"—whether the provisions are intended or not—gives rise to an "Operational Failure" that could jeopardize the plan's tax qualification. Rev. Proc. 2008-50, 2008-35 I.R.B. 464, § 5.01(2)(b). To correct the failure, the employer must apply for permission to amend "to conform the terms of the plan to the plan's prior operations," *id.* § 4.05(1), providing a detailed "identification of failures" and an explanation of "administrative procedures" adopted to prevent future failures, *id.* § 11.03(5) & (11). There is also a fee, which, if the failure is "egregious," *id.* § 4.11, can be as high as 40% of the "Maximum Payment Amount," *id.* § 12.06. Employers looking for an end-run around this onerous and expensive process will seek judicial reformation and take their chances with the IRS in court.

The Pension Benefit Guaranty Corporation—which essentially provides insurance to employee benefit plans, 29 U.S.C. § 1302(a)—is on record against the availability of reformation for unambiguous ERISA

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[4] *See also* David A. Pratt & Martin M. Heming, *Focus On . . . Scrivener's Errors*, 15 J. Pension Benefits 19 (Summer 2008) ("IRS representatives have consistently taken the position that the doctrine of scrivener's error does not allow an employer simply to self-correct a mistake in a retirement plan document.").

plans. It successfully advocated that position in *Audio Fidelity Corp. v. PBGC*, 624 F.2d 513, 517 (4th Cir. 1980). That makes sense because the PBGC operates, in part, on premiums paid by plan sponsors, *see* 29 U.S.C. §§ 1306 & 1307, calculated "based on the plan provisions," 29 C.F.R. § 4006.4(a). If unambiguous plan terms are subject to change, no matter how old the alleged error, the PBGC's insurance function and funding could be seriously undermined.

V. If the Court does not grant plenary review, it should hold the petition and then GVR the case in light of *Cigna Corp. v. Amara*.

If the Court does not grant plenary review, then it should hold this petition pending the disposition of *Cigna Corp. v. Amara*, No. 09-804 (argued November 30, 2010), and then GVR the case in light of that decision.

In *Amara*, a class of 26,000 plan participants sued for benefits due under plan summaries that were more employee-favorable than the formal plan document. *Amara v. Cigna Corp.*, 534 F. Supp. 2d 288 (D. Conn. 2008). The employer maintained that each individual participant should be required to prove he or she actually read and relied on the summaries. *Id.* at 352. The participants argued that the court need only make an objective determination that a hypothetical reasonable participant reading the summaries would "likely" have been prejudiced, *id.*, and the district court and the Second Circuit agreed. 348 Fed. Appx. 627 (2d Cir. Oct. 6, 2009), *cert. granted*, 130 S. Ct. 3500 (2010).

This Court granted certiorari to decide whether a showing of "likely harm" is sufficient to entitle

participants to recover under an SPD that contains terms more favorable to the employee than "the plan itself." Cigna's Pet. for Writ of Cert. at i. During oral argument, the Court raised, among other issues, (1) what degree of reliance, if any, is required to recover under plan documents, Hr'g Tr. 17–18, (2) how a standard of "likely harm" or reliance could be satisfied, *id.* 21–22, 36–38, and (3) what to do when a master plan document promises greater benefits than a summary, *id.* 28, 30, 44.

All these issues are implicated in this case. In fact, this case is the flipside of *Amara*. Here, Verizon essentially sued a class of 14,000 plan participants for equitable relief to enforce its communications over the formal plan document. But Verizon never proved that all 14,000 plan participants individually read, understood, and relied on those communications. (*See* Section I.B., above.) Instead, the Seventh Circuit held Verizon was entitled to equitable relief because it was "likely" participants did not actually rely on the Plan. App. 18a. That standard is the mirror image of the Second Circuit's "likely harm" standard for erroneous SPDs. If the Court holds in *Amara* that each participant must individually prove detrimental reliance to recover benefits in an SPD, a GVR is warranted so the Seventh Circuit can apply the same standard to Verizon's class-wide counterclaim.

If, on the other hand, the Court agrees that an SPD is a plan document and that reliance is not required for an ERISA § 502(a)(1)(B) claim for benefits, that decision would conflict with the Seventh Circuit's importation of a reliance requirement here.

Thus, at a minimum, the petition should be held pending the resolution of *Cigna Corp. v. Amara*, No. 09-804.

CONCLUSION

The Court should decide whether an employer is responsible for the benefits it *actually* promises in an ERISA plan or the benefits it *intends* to promise. The petition for writ of certiorari should therefore be granted.

Respectfully Submitted,

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